United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

76-4212

United States Court of Appeals

FOR THE SECOND CIRCUIT

NO. 76-4212

THE CONNECTICUT LIGHT AND POWER COMPANY
Petitioner

v.

FEDERAL POWER COMMISSION
Respondent

ON PETITION FOR REVIEW FROM THE
FEDERAL POWER COMMISSION

REPLY BRIEF OF THE PETITIONER THE CONNECTICUT LIGHT AND POWER COMPANY

Attorneys for Petitioner:
DAY, BERRY & HOWARD
One Constitution Plaza
Hartford, Connecticut 06103

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REPLY ARGUMENT

I. NO CONSTRUCTION OF A "DAM OR OTHER PROJECT WORKS" OCCURRED ON THE STEVENSON PROJECT AFTER 1935, ALTHOUGH SUCH CONSTRUCTION IS A PREREQUISITE TO COMMISSION JURISDICTION UNDER THE 1935 AMENDMENT TO THE FEDERAL POWER ACT.

The Federal Power Commission (hereinafter "Commission") concedes in its Brief (hereinafter "Br.") that jurisdiction to license The Connecticut Light and Power Company's (hereinafter "CL&P") Stevenson Project is absent under the 1935 amendment to the Federal Power Act (hereinafter "Act") if only "work in the nature of maintenance, repair, replacement, or modest additions to existing structures" occurred thereon after 1935. As the evidence demonstrates, the work on the Stevenson Project done after 1935 involved merely a modest addition, the installation of a fourth generating unit within the *existing* powerhouse, without substantial alterations to the dam, intake facilities, powerhouse or tailrace. (Transcript 95-96, Joint Appendix 405-06) (hereinafter "Tr." and "App.", respectively).

The testimony of Mr. Ferreira, relied on by the Commission as "substantial evidence" of construction of a "dam or other project works", does not support the Commission's position. (Tr. 195-96, App. 503-04). In relevant part Mr. Ferreira testified:

> Although the [Stevenson] project was constructed with the inherent capability to accept a fourth unit, installation of that unit was postponed until additional generating capacity was required by the growth of system load.
>
> ****
>
> United Engineers and Constructors, Inc. concluded that the capacity of the fourth unit could be larger than that of the other three units at the Stevenson

project, without necessitating structural changes in the project, due to improvements in turbine manufacture . . . .

. . . *The installation required no substantial alterations in the dam or powerhouse. . . .*

[Emphasis added.] (Tr. 95, App. 405).

Mr. Ferreira further stated:

[A] generator was purchased, and completion of the foundation was made, the provisions having been made in the powerhouse for the existence of that [fourth] unit.

(Tr. 196, App. 504).

The foundation work for the fourth generating unit at the Stevenson Project was certainly not construction of a "dam or other project works". The work done was comparable to the replacement of the timber-cribbed dam in *Public Service Company of New Hampshire,* 27 F.P.C. 830 (1962), *modified,* 31 F.P.C. 417 (1964), or the modification of a dam to increase its stability and improve its hydraulic characteristics in *Western Massachusetts Electric Co.,* 32 F.P.C. 129, *modified,* 32 F.P.C. 733 (1964). In its Brief, the Commission has simply ignored these decisions.

The Commission's reliance (Br. at 44) on *Bangor Hydro-Electric Co.,* 33 F.P.C. 278 (1965), *aff'd,* 355 F.2d 13 (1st Cir. 1966), is misplaced. That decision involved construction of an *additional powerhouse,* as well as additional generating units.

The Commission rests its argument in part on the fact that the fourth unit increased the generating capacity of the Stevenson Project by about one-third. However, in its Brief the Commission ignores the conclusion in the Commission's Decision that the work done on the Rocky River Project, which increased generating capacity of that project by over one-fourth, was not construction of a "dam or other project works." (See Dec. 25, App. 101).

Nothing referred to in the Commission's Brief demonstrates that the record contains substantial evidence of the

construction of a "dam or other project works" at the Stevenson Project after 1935. On the contrary, under applicable authorities, the evidence in the record precludes any finding that such construction occurred.

II. NEITHER THE STEVENSON PROJECT NOR THE SHEPAUG PROJECT AFFECTS INTERSTATE OR FOREIGN COMMERCE, ALTHOUGH THIS IS A PREREQUISITE TO COMMISSION JURISDICTION UNDER THE 1935 AMENDMENT TO THE ACT.

The Commission made no finding that any energy from the Stevenson or Shepaug projects is transmitted interstate. With respect to this issue the Decision rests solely on the conclusion that "in a system with interstate sales and transmission, every generating facility affects interstate commerce." (Dec. 29, App. 105). No case decided under Section 23(b) of the Act has gone so far in extending the Commission's licensing jurisdiction.

The Commission makes no serious attempt to distinguish *F.P.C. v. Union Electric Co.*, 381 U.S. 90, 110 (1965) ("*Taum Sauk*"), which apparently excludes from Commission jurisdiction under the 1935 amendment to the Act *projects* without interstate sales. The Supreme Court's discussion in *Taum Sauk* indicates that a direct effect on interstate commerce through interstate transmission of energy from the *project* under consideration, not some theoretical indirect impact, is required to establish Commission jurisdiction. Even the Decision concedes that "no court has said that mere participation in an interconnected interstate electric system, without more, establishes the transmission of electric energy to any point across state lines." (Dec. 27, App. 103).

Nevertheless, the Commission seeks to have this Court hold that mere interconnection automatically constitutes substantial evidence of an effect on interstate commerce sufficient to support the Commission's licensing jurisdiction pursuant to Section 23(b) of the Act. Such a conclu-

sion would constitute a dramatic, unwarranted expansion of Commission jurisdiction over facilities already subject to a great deal of federal and state regulation. Such a conclusion would be particularly inappropriate in this proceeding, where the four hydroelectric projects involved have a total capacity of only 115.7 megawatts compared with total CL&P system capacity of over 5,600 megawatts. (Tr. 177, App. 485). Assuming that these projects might indirectly affect interstate commerce through mere interconnection, any such effect is surely de minimis and was not intended by Congress to be the basis for Commission jurisdiction.

III. BY OPERATION OF THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL THE HOUSATONIC RIVER MUST BE FOUND NOT TO BE "NAVIGABLE WATERS" AT THE FOUR PROJECTS, WHICH ARE THEREFORE NOT SUBJECT TO COMMISSION JURISDICTION UNDER THE ACT.

The Commission argues that the issue of the navigability of the Housatonic River was not before it in *Electric Power, Inc.*, 11 F.P.C. 1548 (1952). (Br. at 33-41). However, Section 23(b) of the Act requires that a project in navigable waters must be licensed. The Commission has no discretion under Section 23(b) and was obligated to consider the navigability of the Housatonic River in order to reach its decision in 1952. The Commission's finding that no license was required is final and binding.

The Commission claims that Electric Power, Inc.'s declaration of intention was filed pursuant to the second sentence of Section 23(b) and that the Commission, therefore, did not consider the issue of navigability. However, nothing in the record of this proceeding indicates that the declaration was filed pursuant only to the second sentence of Section 23(b) of the Act. Rather, the record shows that the declaration of intention was filed "under Section 23(b)

. . . ." *Electric Power, Inc., supra.* (App. 922). For this reason alone, the Commission's claims based on this argument must fail.

Moreover, there is evidence in the record that the Commission did, in fact, consider the question of navigability in 1952. (See CL&P Brief at 16-17). Nothing in the record indicates that the Housatonic River has changed since 1952 or that the Commission's 1952 conclusion of non-navigability was based on erroneous factual assumptions, rather than an accurate evaluation of all relevant evidence. Nor does the record demonstrate that new evidence, unavailable in 1952, has subsequently come to light "clearly mandating" a finding of navigability.

The Commission's argument (Br. at 41) that CL&P's predecessor somehow induced the Commission to ignore the issue of navigability in 1952 is completely without support in the record.

IV. THE RECORD DOES NOT CONTAIN SUBSTANTIAL EVIDENCE THAT THE HOUSATONIC RIVER IS "NAVIGABLE WATERS OF THE UNITED STATES" AT EACH PROJECT UNDER CONSIDERATION.

A. Applicable Case Law.

The Commission suggests that substantial evidence of "suitability" of a river for use to transport large amounts of logs is sufficient to support licensing jurisdiction over projects such as those under consideration in this proceeding. (See Br. at 5, 11, 24-25). No case is cited in support of this novel proposition, and no case has so held. The only case law discussing evidence of commercial logging as a basis for a finding of navigability involves actual operations of a very substantial nature. *See, e.g., Wisconsin Public Service Corp. v. F.P.C.*, 147 F.2d 743 (7th Cir.), *cert. denied*, 325 U.S. 880 (1945); *State of Wisconsin v. F.P.C.*, 214 F.2d 334 (7th Cir.), *cert. denied*, 348 U.S. 883

(1954). The Commission properly quotes *Wisconsin Public Service Corp. v. F.P.C., supra* at 748, for the test of the type of evidence of logging necessary to establish navigability. (Br. at 9). A comparison of the evidence in this proceeding with a record showing a "*long, regular and commercially successful use* of the stream for transportation of logs . . .", *Wisconsin Public Service Corp. v. F.P.C., supra* at 748 [emphasis added], shows why the Commission is in error in holding that CL&P's four hydroelectric projects are in navigable waters of the United States.

The Commission apparently relies on this Court's decision in *Rochester Gas & Electric Corp. v. F.P.C.*, 344 F.2d 594 (2d Cir.), *cert. denied*, 382 U.S. 832 (1965), to support its novel legal theory. However, that case involved only commercial boating. There was no evidence of use of the Genesee River to float logs downstream or of the suitability of that river for such use.

For these reasons, CL&P vigorously contests the Commission's argument that "suitability" of the Housatonic River for the floating of logs in a commercial operation is pertinent to the issues before this Court. Even if such an argument were pertinent, the record does not contain substantial evidence of such suitability.

The Commission made no finding that the Housatonic River could be made susceptible to navigation in the future by improvements, or that conditions of the Housatonic River had changed. (App. 99). Therefore, the Commission's reliance on *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940), for the assertion that "a river's ordinary condition" does not preclude a finding of navigability (Br. at 8) is irrelevant to this proceeding.

B. The Items Cited In The Commission's Brief Do Not Amount To Substantial Evidence Of Commercial Logging Operations On The Housatonic River.

1. Dewey Account.

The Commission makes much of Reverend Chester

Dewey's supposed credentials as a "naturalist." (Br. at 12-13). Even assuming the best of credentials, it scarcely follows that his 1829 statement regarding logs having been "thrown" in the river is entitled to considerable weight. An ambiguous, one-sentence reference to something not personally observed by the writer is entitled to little, if any, weight.

The Commission's Brief relies on Samuel Orcutt's 1880 account of floods to support an interpretation of Dewey's statement as an indication of deliberate floating of logs in the Housatonic River. (Br. at 13). There is nothing in Orcutt's *History of Derby* that even remotely suggests that the Housatonic River was used for commercial logging or that Dewey's account did not refer to accidental floating of logs. (See App. 456).

The Commission's quotation from Joseph Hoyt (Br. at 14) is irrelevant, since Hoyt never identifies what river or rivers he is discussing. (See App. 263).

2. Samuel Church.

As if no further explanation were necessary, the Commission suggests that Samuel Church's 1841 statement is particularly credible because it was made "during an historical address, which itself was later published." (Br. at 15). The Commission fails to discuss why "an historical address, which itself was later published," is entitled to credibility even though it was clearly hearsay and did not indicate the historical records, if any, upon which it was based.

In any event, Church's statement hardly amounts to evidence of commercial logging substantial enough to warrant a finding of navigability at the four projects. In contrast, see *Wisconsin Public Service Corp. v. F.P.C., supra.*

3. Mast Swamp.

The Silas Patterson statement of 1905 is without value as evidence of commercial logging on the Housatonic River.

The Commission's reference to Patterson's "awareness of detail" (Br. at 16) merely highlights Patterson's obvious reliance on legend rather than historical data.

The Commission can scarcely look to Reverend Edward Starr for support of Patterson (*Id.*), since Patterson was obviously Starr's source of information. The mere fact that legend is repeated does not establish the truth of the legend.

Since the Commission does not identify Theodore S. Woolsey (*Id.*), Woolsey's 1926 assessment of Starr is irrelevant. The record contains no evidence indicating Woolsey was a historian. He may have been merely a salesman of local histories of Connecticut.

4. Old Public Acts.

The Commission claims that the two public acts, one passed in 1795 and one in 1807, cannot be discounted as meaningless and demonstrate that the Connecticut General Assembly "had reason to declare that logging on the river not be interrupted." (Br. at 19). Unfortunately the Commission does not explain why these acts should not be discounted or just what the "reason" was.

The assertion of the Commission that these acts "imply commercial logging on the Housatonic" (Br. at 19) is an impermissible inference, no different from that sought to be drawn from the name of a town and rejected in *Rochester Gas & Electric Corp. v. F.P.C., supra.*

Although these acts may show a belief by the legislature that logging of commercial value might be possible on the Housatonic River, such a belief in a possibility of logging is clearly of no evidential value in support of the Commission's finding of navigability.

5. Frank Stowe.

CL&P's Brief has already commented on the doubtful evidential value of the Frank Stowe recollection. To claim that it shows "rafting of timber" (Br. at 21) is a clear mis-

reading of the account. Stowe's newspaper account states that he used a timber raft as a boat on the river. He definitely did not state that commercial loggers strapped logs together to ship them downstream as part of a commercial logging operation.

CL&P did not "ignore" this aspect of Stowe's account. (Br. at 22). Since Stowe was talking about boating rather than logging, this part of his tale has no place in a discussion of the absence of substantial evidence of commercial logging on the Housatonic River.

C. Unrebutted Evidence In The Record Establishes That The Housatonic River Has Not Been Used For Commercial Logging Operations.

The Commission argues (Br. at 26-29) that CL&P has failed to establish that logging could not have occurred. Although CL&P believes that it has established that logging could not have occurred and did not occur, it need not do so to prevail in this proceeding.

In the first place, the Commission has the burden of proving navigability. See Section 313(b) of the Act, 16 U.S.C. § 825 l(b). CL&P has no burden to establish anything. Secondly, no court has ever gone so far as to say that a river is non-navigable only if commercial logging "could not" occur. Physical impossibility of logging has never been the dividing line between a finding of navigability and non-navigability. Thirdly, as noted above, no court has ever used "suitability" for commercial logging as a test of a river's navigability.

Undoubtedly, the Commission would prefer to litigate a case wherein its adversary had the burden "to establish that logging could not have occurred." (Br. at 26). However, the Commission cannot prevail in this proceeding on such a basis.

The Commission tries to belittle Professor Collier's testimony concerning his examination of sawmill account

books. (Br. at 26). However, Professor Collier is an acknowledged expert in Connecticut history and the only professional historian who submitted testimony in this proceeding. CL&P urges the Court to keep in mind the significance of this evidence. Professor Collier's extensive research revealed no entry of commercial floatation of logs down the Housatonic River and the Commission did not introduce into evidence one iota of research into sawmill account books to contradict that evidence.

Professor Collier's testimony regarding his review of old newspapers (Tr. 387-88, App. 572-73) shows that he performed a "thorough reading" of all of the newspapers available in the major repository of newspapers for early history of the area. He "exhausted" this facility, as well as the Litchfield Historical Society. The Commission seeks to divert attention from the central point when it suggests that Professor Collier's research is of little value because he only "scanned" the newspapers. (Br. at 26). As with the sawmill account books, the Commission introduced no evidence of contemporaneous newspaper accounts of commercial logging. CL&P did introduce substantial evidence that no such logging ever occurred on the Housatonic River.

The Commission also seeks to discredit Professor Collier because he did not mention in his testimony the 1807 public act which referred to logging. (Br. at 27). The obvious reason why he did not mention this act is its lack of relevance to the history of activities that actually occurred on the Housatonic River.

D. The Record Does Not Contain Substantial Evidence That The Housatonic River Has Been Used For Navigation By Boat In Interstate Or Foreign Commerce Or That It Is Suitable For Such Use.

The Commission fails to set out in detail the evidence of boating that allegedly substantiates the finding of navigability. (Br. at 30-32). This is a strong indication that the

Commission has little hope of establishing its licensing jurisdiction over the four projects on the basis of boating.

The Commission's argument regarding boating consists for the most part of a rebuttal to an argument not made by CL&P. The Commission claims "CL&P argues (Br. pp. 28; 29-30) that pre-1776 evidence is not relevant to this proceeding." (Br. at 30). CL&P made no such argument in its Brief and makes none here. CL&P merely demonstrated that the *particular* fragments of pre-revolutionary history, legend and folklore relied upon by the Commission in support of its finding of navigability were in no sense substantial evidence of the use or suitability of the Housatonic River for navigation in interstate or foreign commerce after the founding of the Nation.

CONCLUSION

For the reasons stated in CL&P's Brief, and those stated here, the Court should set aside the order of the Commission and remand this proceeding to the Commission with directions to issue an order finding that Commission jurisdiction is lacking.

Respectfully submitted,

Petitioner
THE CONNECTICUT LIGHT AND POWER COMPANY
By JAMES R. MCINTOSH
By JAMES L. ACKERMAN
For DAY, BERRY & HOWARD
One Constitution Plaza
Hartford, Connecticut 06103
(203) 278-1330
Its Attorneys

On the Brief:
RENARD J. KOLASA

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

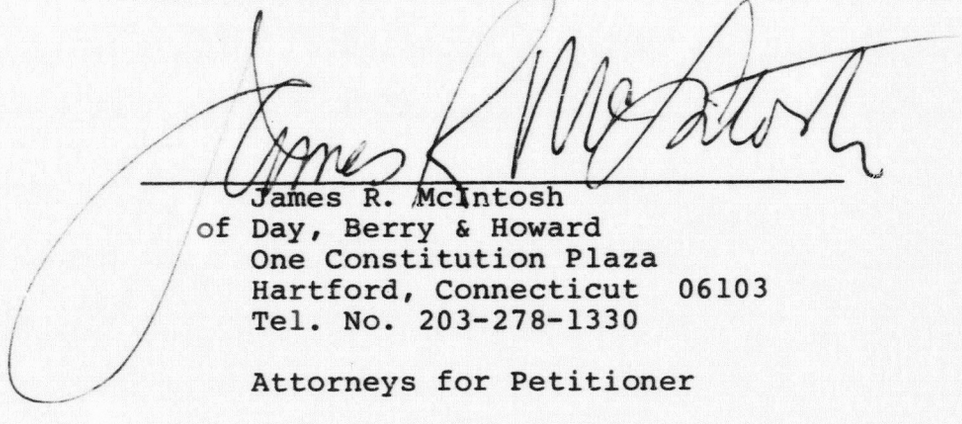
THE CONNECTICUT LIGHT AND POWER COMPANY Petitioner	)	
v.	)	NO. 76-4212
FEDERAL POWER COMMISSION Respondent	)	

CERTIFICATE OF SERVICE

It is hereby certified that service of the Reply Brief of the Petitioner has been made upon opposing counsel by mailing two (2) copies thereof, on this 4th day of February, 1977, in an envelope, with postage prepaid, properly addressed to them as follows:

Philip R. Telleen, Esq.
Federal Power Commission
825 North Capitol Street, N.E.
Washington, D.C. 20426

Olga Boikess, Esq.
Galland, Kharasch, Calkins & Brown
1054 31st Street, N.W.
Washington, D.C. 20007



James R. McIntosh
of Day, Berry & Howard
One Constitution Plaza
Hartford, Connecticut 06103
Tel. No. 203-278-1330

Attorneys for Petitioner